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MAR 17 1975

In the Supreme Court of the United States

No. 74-

NORA GARCIA, ROBERT ALANIZ, RANDY JACKSON, RAMON BARBERRA, and JOE AGUILLAR,
Petitioners,

vs.

WILLIAM GRAY, HOWARD PRICE, FLOYD ECONOMIDES, CHARLES HAMMET, CECIL HILL, ROBERT BRISINIO, FRED MERMIS, WAYNE KEMP, individually and as members of the City Council of the City of Artesia, and ERNEST THOMPSON, individually and as Mayor of the City of Artesia,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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No. 74-

NORA GaRCIA, ROBERT ALANIZ, RANDY JACKSON, RAMON BARERRA, and JOE AGUILLAR,

Petitioners,

-v-

WILLIAM GRAY, HOWARD PRICE, FLOYD ECONOMIDES, CHARLES HAMMETT, CECIL HILL, ROBERT BRISINIO, FRED MERMIS, WAYNE KEMP, individually and as members of the City Council of the City of Artesia, and ERNEST THOMPSON, individually and as Mayor of the City of Artesia,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on December 17, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, affirming the final judgment of the United States District Court for the District of New Mexico, is reported at 507 F. 2d 539, and is set forth in the Appendix, infra, p. 1a. The final judgment of the District Court is not reported; it is set forth in the Appendix, infra, p. 18a. The District Court's Memorandum Opinion of December 28, 1973 granting the plaintiffs' partial permanent injunctive and declaratory relief, but denying them complete relief, is unreported. It appears in the Appendix, infra, p. 20a. The District Court's Memorandum Opinion of January 22, 1973, granting the plaintiffs a preliminary injunction is unreported. It appears in the Appendix, infra, p. 24a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1974 in accordance with the Opinion issued on that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

United States Constitutional Provisions.

First Amendment:

> Congress shall make no law. . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, Section 1:

> . . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

City of Artesia Ordinances:

ORDINANCE NO. 343

AN ORDINANCE DECLARING IT TO BE UNLAWFUL FOR ANY PERSON TO ENGAGE IN PICKETING BEFORE OR ABOUT THE RESIDENCE OR DWELLING OF ANY INDIVIDUAL: AND PROVIDING PEANLTIES THEREFOR.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ARTESIA, NEW MEXICO, as follows:

Section I: Declaration. It is hereby declared that the protection and preservation of the home is the keystone of democratic government; that the public health

and welfare and the good order of the community require that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy, and when absent from their homes and dwellings, carry with them the sense of security inherent in the assurance that they may return to the enjoyment of their homes and dwellings; that the practice of picketing before or about residences obstructs and interferes with the free use of public sidewalks and public ways of travel; that such practice has as its object the harassing of such occupants; that such practice constitutes a nuisance and a practice which should be prohibited; and without resort to such practice full opportunity exists, and under the terms and provisions of this ordinance, will continue to exist for the exercise of freedom of speech and other constitutional rights; and that the provisions hereinafter enacted are necessary for the public interest to avoid the detrimental results herein set forth and are, therefore, enacted by the City Council of the City of Artesia, New Mexico.

Section II: It shall be unlawful within the corporate limits of the City of Artesia, New Mexico, for any person to engage in picketing before or about the residence or dwelling of any individual. Nothing herein shall be deemed to prohibit (1) picketing in any lawful manner during a labor dispute of the place of employment involved in such labor dispute, or (2) the holding of a meeting or assembly on any premises commonly used for the discussion of subjects of general public interest.

Section III: Any person violating the provisions of this ordinance shall be punished by fine or not more than Three Hundred Dollars ($300.00) or imprisonment not exceeding ninety (90) days, or by both such fine and imprisonment.

PASSED, ADOPTED AND APPROVED this 10th day of October, 1972.

CITY OF ARTESIA, NEW MEXICO

By Ernest Thompson

ORDINANCE NO. 347

AN ORDINANCE DECLARING IT TO BE UNLAWFUL FOR ANY PERSON TO ENGAGE IN PICKETING BEFORE OR ABOUT THE RESIDENCE OR DWELLING OF ANY INDIVIDUAL: AND PROVIDING PENALTIES THEREFOR.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ARTESIA, NEW MEXICO, as follows:

Section I: Declaration. It is hereby declared that the protection and preservation of the home is the keystone of democratic government; that the public health and welfare and the good order of the community require that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy, and when absent from their homes and dwellings, carry with them the sense of security inherent in the assurance that they may return to the enjoyment of their homes and dwellings; that the practice of picketing before or about residences obstructs and interferes with the free use of public sidewalks and public ways of travel; that such

practice has as its object the harassing of such occupants; that such practice constitutes a nuisance and a practice which should be prohibited; and without resort to such practice full opportunity exists, and under the terms and provisions of this ordinance, will continue to exist for the exercise of freedom of speech and other constitutional rights; and that the provisions hereinafter enacted are necessary for the public interest to avoid the detrimental results herein set forth and are, therefore, enacted by the City Council of the City of Artesia, New Mexico.

Section II: It shall be unlawful within the corporate limits of the City of Artesia, New Mexico, for any person to engage in picketing before or about the residence or dwelling of any individual.

Section III: Any person violating the provisions of this ordinance shall be punished by fine of not more than Three Hundred Dollars ($300.00) or imprisonment not exceeding ninety (90) days, or by both such fine and imprisonment.

PASSED, ADOPTED AND APPROVED this 22 day of May, 1973.

CITY OF ARTESIA, NEW MEXICO

By Ernest Thompson
Mayor

QUESTIONS PRESENTED

(1) Does the City of Artesia's Ordinance No. 347, which bars, absolutely, all residential picketing, violate, on its face and as applied, the plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution to freedom of speech, and to peaceful assembly to petition the Government for redress of grievances?

(2) Is the City of Artesia's Ordinance No. 347 unduly broad and vague in violation of the First and Fourteenth Amendments to the United States Constitution in that it prohibits all residential picketing, regardless of whether: there are one or one hundred picketers; the picketing occurs during daylight or night; the picketers are silent, speaking in conversational tones, or shouting; the picketing occurs on private or public property; there is any obstruction of pedestrian or vehicular traffic; ingress to or egress from the residential property is hindered; the situs of the picketing is the home of a public official or of a private citizen; the situs of the picketing is used purely for residential purposes or is also used for business and public purposes; the situs of the picketing is located in a purely residential neighborhood or a mixed

"commercial" and residential neighborhood; reasonably effective alternative means of communicating are available to the picketers; and the Ordinance does not define "picketing"?

STATEMENT OF THE CASE

Procedural History

On October 10, 1972, the City of Artesia, New Mexico promulgated City Ordinance No. 343, which declared it unlawful "for any person to engage in picketing before or about the residence or dwelling of any individual." (R. 13; pp. 3-5 supra.)[1] The Ordinance, however, did not "prohibit (1) picketing in any lawful manner during a labor dispute of the place of employment involved in such labor dispute, or (2) the holding of a meeting or assembly on any premises commonly used for the discussion of subjects of general public interest." (R. 13-14; p. 4, supra.)

On April 27, 1973, plaintiffs, several individuals who want to picket, in a peaceful manner, residences of certain part-time elected government officials of the City of Artesia in connection with a labor dispute and

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[1] References to the Record in this case are indicated as (R.__); references to the Transcript of the trial in the District Court are indicated as (Tr.__).

racial grievances, filed a complaint in the United States District Court for the District of New Mexico seeking a declaratory judgment and preliminary and permanent injunctions against any further enforcement of Ordinance No. 343. (R. 1-14.) They asserted that the Ordinance violated their rights to freedom of speech and peaceful assembly, and the equal protection of the laws, under the First and Fourteenth Amendments to the United States Constitution. Jurisdiction was predicated on 28 U.S.C. § 1343(3) and (4), to enforce a claim arising under 42 U.S.C. § 1983.

A hearing was held on plaintiffs' Motion for Preliminary Injunction on May 18, 1973. (Tr. 2-116.) On June 22, 1973, the District Judge issued a preliminary injunction restraining, on equal protection grounds, further enforcement of Ordinance No. 343. (R. 39; Appendix, infra, p. 24a.)

On May 22, 1973, after the hearing in District Court, but prior to the issuance of the preliminary injunction, the defendants promulgated and enacted a new Ordinance, No. 347, which is a prohibition of residential picketing identical to Ordinance No. 343, except that it does not include the proviso authorizing labor dispute picketing and the holding of public meetings or assemblies. (R. 52-53; pp.5-6 , supra.) The new

ordinance did not displace but paralleled Ordinance No. 343.

On July 25, 1973, the plaintiffs moved to file a First Amended Complaint requesting declaratory and injunctive relief against both of the City of Artesia Ordinances. (R. 41.) On August 20, 1973, the Motion was granted. (R. 54.) On August 31, 1973, plaintiffs moved for a preliminary injunction against enforcement of Ordinance No. 347. (R. 69.) On November 23, 1973, plaintiffs moved to consolidate the hearing on the Motion for Preliminary Injunction with the hearing on the Merits. (R. 70.) The Motion to Consolidate was granted on November 30, 1973 (R. 71), and the trial on the merits was conducted on that day (Tr. 117-224).

The District Court issued its final Memorandum Opinion and entered its Judgment on December 28, 1973. (R. 72, 76; Appendix, infra, pp. 18a, 20a.) It declared Ordinance No. 343 unconstitutional on equal protection grounds and permanently enjoined its enforcement; but it denied declaratory and injunctive relief against Ordinance 347. On December 17, 1974, the United States Court of Appeals for the Tenth Circuit, in an opinion by Judge Barrett, affirmed the denial of relief against Ordinance No. 347.

(507 F.2d 539, Appendix, infra, p. 1a.) Judge Seth concurred in a separate opinion. (507 F. 2d at 545; Appendix, infra, p. 15a.) No appeal had been taken by the defendants from the District Court's voiding, on equal protection grounds, of Ordinance No. 343.

Statement of Facts

The events forming the basis for the instant lawsuit commenced at least as early as the summer of 1972, when the United Steel Workers of America began to organize the government employees of the City of Artesia, who were largely racial minority group members. (E.g., Tr. 131-34.) Thus, as the defendants have conceded, at the heart of the present controversy is a public employment labor dispute which has its roots in and is eclipsed by racial tension and at least the belief on the part of the plaintiffs, and many other people, that the government and power structure of the City of Artesia discriminate pervasively against Chicanos.[2] (E.g., Tr. 131-33, 142-44, 168, 177, 179-80, 188, 198-99.) Certainly this view of the underlying controversy was adopted both by the District Court (R. 35; Appendix, infra, at pp. 26a-27a), and by the Court of

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[2] "Chicano" and "Mexican American" are terms which are used interchangeably in the Southwest.

Appeals (507 F.2d at 541; Appendix, infra, at pp. 2a-4a). Hence, although the existence of racial and ethnic discrimination is not itself a direct issue in the instant lawsuit, the question of such discrimination pervades the controversy.

As the District Court found, "[t]he plaintiffs are persons who have picketed at public buildings and have attended Artesia City Council meetings to express their grievances with regard to alleged racial tensions, discrimination in schools, the unresponsiveness of local government, support for certain city employees on strike, and a unionization attempt of city employees." (R. 35; Appendix, infra, p. 26a.) The defendants are members of the Artesia City Council and its mayor. (R. 55-56, 65.)

Since the summer of 1972 numerous attempts have been made by union proponents and persons protesting racism to communicate with members of the Artesia City government and power structure, and the public. Efforts have been made to address the meetings of the City Council and other public bodies, public buildings have been picketed, parades have been conducted, attempts have been made to secure radio and television coverage and letters have been directed to

newspaper editors. Although the defendants, and their witnesses insist that they have received the plaintiffs' intended messages through these media (see, e.g., Tr. 136-39, 179-80; but see Tr. 142-44), there is ample evidence that the defendants were unresponsive and these media were either unavailable to the plaintiffs or inadequate for productive communication to the defendants and the public.

That the defendants were unresponsive is demonstrated by their own testimony. For example, (1) the City Council "tabled" discussion of the public employees' strike in late 1972 or early 1973 (Tr. 92-94) and did not thereafter take up the question again (e.g., Tr. 198-99). (2) In March of 1973 the mayor rejected a written request by one of the plaintiffs to meet and confer concerning the strike (R. 81-82, Pl. Ex. 1 and 2) because "I felt there was no need of meetints with these people. I've seen these young people. I've seen these young people in action in front of my house on several occasions; very loud, very noisy; and I felt like a meeting with them would only cause other confrontations. I didn't feel like it was necessary" (Tr. 74-75). (3) The members of the City Council were unresponsive to and considered monotonous citizens' complaints about the City's racial discrimination

and its failure to recognize the union (e.g., Tr. 198-99). (4) The defendants consistently denied the existence of any racial discrimination in the City of Artesia (see, e.g., 132-34, 142-44).[3]

The plaintiffs testified that they were unable to address the City Council sessions freely on the issues in contention. (E.g., Tr. 32, 207-208.) Although some of the defendants deny that they refused anyone of the right to speak at City Council sessions (e.g., Tr. 73-74; but cf., Tr. 200), they admit to having limited significantly the time for discussion and its scope (e.g., Tr. 73-74, 199-200). The plaintiffs' ability to communicate with the defendants through picketing of the City Hall and other public buildings was also severely limited because the defendants' service as mayor and City Council was only part time, a d they were rarely at government buildings during reg"lar business

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[3] An appeal from a decision, after trial before the United States District Court for the District of New Mexico, in favor of the same defendants as in the instant case, in a separate lawsuit alleging systematic racial discrimination in public employment, has been docketed in the United States Court of Appeals for the Tenth Circuit. Hernandez v. Gray, 10th Cir. No. 75-1102 (Docketed, Feb. 3, 1975). (See R. 83-84, PL. Ex. 3.)

hours. (E.g., Tr. 19-21, see Tr. 145.) The mayor testified that at most, he was at "City Hall every morning from 8:30 to approximately 9:30 or 9:30 to 10:00 o'clock every day, except Saturdays and Sundays. Sometimes in the afternoon." (Tr. 72.) No City Council member had an office at City Hall, nor kept any kind of regular hours there. (Tr. 91.) The plaintiffs were also unable to get letters to the editor published in Artesia's primary newspaper, the "Artesia Daily News" (Tr. 206-07, 210); they could not persuade the local television station to do any in-depth ". . .story on the Artesia strike, and some of the problems in Artesia. . . ." (Tr. 215); and they and "the poor people in Artesia" could not afford promotional spots on television or paid advertising (Tr. 215).

Because of their inability to communicate effectively by other means, the plaintiffs sought to picket the defendants' residences. (E.g., Tr. 19-21, 36, 47, 49-51, 121-22.) They also want to engage in such picketing because "You reach one kind of the masses with newspaper advertising, or TV or radio or whatever, and with parading or picketing, you reach someone else. I think you've got to combine all the methods, and you've got to

utilize all the methods to get your point across." (Tr. 216.) Further, the purpose and effect of the residential picketing is not merely to communicate with the defendants, but with other members of the public as well. (See Tr. 146.) Thus their purpose in conducting residential picketing was to establish a dialogue on important public issues.

Picketing of the defendants' residences commenced on or about September 20, 1972. (Tr. 134.) On October 10, 1972, the defendants enacted Ordinance No. 343, prohibiting such picketing except "(1) picketing in any lawful manner during a labor dispute of the place of employment involved in such labor dispute, or (2) the holding of a meeting or assembly on any premise commonly used for the discussion of subjects of general interest." (P. 4 , supra.) The Ordinance became effective on October 15, 1972. (Tr. 134.) Subsequently, picketing by persons other than the plaintiffs occurred at the mayor's house on October 17, 1972. Sixteen (16) people were arrested (Tr. 70), four (4) for breach of the peace (Tr. 79), and the rest presumably for violation of the Ordinance. Residences of members of the City Council were picketed by persons other than the plaintiffs that night as well.

(E.g., Tr. 81-82.) There is no evidence that anyone else was arrested for breach of the peace, parading without a permit or any other such law because of participation in residential picketing either before or after the enactment of Ordinance No. 343. (See, e.g., Tr. 84-87, 163-68, 173-74.) Further, except for two isolated and ambiguous incidents, the defendants and their witnesses agreed that there was no violence at any of the sites of residential picketing and the participants made no threats of violence and violated no laws other than the ordinances at issue in the instant case. (E.g., Tr. 68-71, 84-87, 152-53, 163-68, 171-74, 182-84, 190-97.)[4]

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[4] One defendant testified that one morning after picketing at his house, he found a sign on his lawn stating: "Creep, remember you have a wife and kids too." (Tr. 81.) The Record does not clarify whether or not this was intended or was taken as a threat. Another defendant did testify that he had seen threatening signs, but he did not describe them. (Tr. 189.) He also testified that one of the plaintiffs, whom he had known for years, had said to him: "I don't know how long we can hold them, and they--I assume the picketers, I don't know" who they were other than "the mass, the group." (Tr. 190.) This defendant was at pains, however, to explain that this plaintiff was not himself making a threat; indeed, the defendant was confident that the plaintiff was attempting to discourage violence. (Tr. 190-93.) It does not appear from the testimony that this conversation took place during picketing.

As the District Court correctly found: "None of the plaintiffs has engaged in residential picketing since its [Ordinance No. 343's] passage. Rather than disobey it and risk prosecution, they seek to overcome it by the present action." (R. 35, Appendix, infra, p. 27a. Accord, e.g., Tr. 179, 212.) The defendants also confirmed that none of the plaintiffs has been violent or unlawful, threatened such acts, or given cause for the defendants to fear them. (See, e.g., Tr. 190-93.) And no evidence was offered to controvert the plaintiffs' consistent testimony that they intended to picket peacefully, and that they would welcome and obey a proper time, place and manner ordinance, for example, limiting picketing to day light hours only and regulating the number of people picketing at any given time, the location of the picketing in relation to the residence, and the level of noise used by the picketers. (Tr. 21-22, 36, 41, 47, 56, 58, 60, 64, 124, 127-28, 211.) One of the defendants admitted that the City Council did not consider enacting such an Ordinance. (Tr. 87-88.)

On May 22, 1973, several days after the District Court hearing on plaintiffs' Motion for Preliminary Injunction, the defendants, without

formal notice to the District Court or to the plaintiffs, enacted Ordinance No. 347, which is identical to Ordinance No. 343, except that it did not include the proviso of that Ordinance authorizing labor dispute picketing and the holding of public meetings and assemblies. (Pp. 5 - 6 , supra.) Enactment of Ordinance No. 347 was pursuant to advice of counsel, because of the possible constitutional infirmities of Ordinance No. 343. (Tr. 141.) This advice of defendants' counsel was clearly appropriate, for on June 22, 1973, the District Court issued a preliminary injunction against enforcement of Ordinance No. 343, on equal protection grounds. (R. 39.) On December 28, 1973, after the trial on the merits, the District Court declared Ordinance No. 343 unconstitutional and permanetly enjoined its enforcement. (R. 72, 76, Appendix, infra, pp. 18a, 20a.)

Despite entry of the preliminary injunction, the plaintiffs continue to abstain from residential picketing in the City of Artesia, because the defendants threatened them with prosecution under Ordinance No. 347. (Tr. 119-22. See, e.g., Tr. 179.) That Ordinance was sustained by the District Court in its Memorandum Opinion and Judgment entered on December 28, 1973. (R. 72,

76; Appendix, infra, pp. 18a, 20a.) The equal protection defects in Ordinance No. 343 having been cured, the District Court

> . . .concluded that the new ordinance prohibiting picketing in an inappropriate location, is a proper exercise of the city's regulatory power. See Gregory v. Chicago, 394 U.S. 111, 124-26 (1969) (Black, J., concurring opinion.) Further, the language of the ordinance is sufficiently distinct that its boundaries can be understood. The right of privacy in one's home sought to be protected by it is a right worthy of protection. . . .

(R. 74-75; Appendix, infra, p. 23a.)

The District Court further concluded that:

> . . .the evidence shows that the plaintiffs['] grievances are well known by the people they are seeking to inform. The evidence also shows that the residential picketing engaged in by plaintiffs before enactment of the first ordinance was distressing to the defendants. Further, the evidence establishes that there are available to plaintiffs other methods to convey their position and that the plaintiffs have effectively availed themselves of such other means of communication.

(R. 74; Appendix, infra, p. 22a.)

The Court of Appeals affirmed these conclusions in all respects. 507 F.2d 539; Appendix, infra, p.1a.

REASONS FOR GRANTING THE WRIT

I

IN SUSTAINING THE DEFENDANTS' ABSOLUTE BAN ON RESIDENTIAL PICKETING, THE COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The City of Artesia's residential picketing ordinances apparently had their genesis in the Territory of Hawaii. Note, Picketing the Homes of Public Officials, 34 U.CHI.L.REV. 106, 138 (1966). The Hawaiian statute, Hawaii Rev. Laws §§ 300-1, et seq. (1955), is virtually identical to Ordinance No. 343, and, with the exemptions eliminated, to Ordinance No. 347. It is considered a model, Note, supra, 34 U.CHI.L.REV. at 139, and has been adopted in a number of jurisdictions, in addition to Hawaii and the City of Artesia. See, e.g., City of Brookfield v. Groppi, 50 Wisc.2d 166, 184 N.W.2d 96 (1971); City of Wauwatosa v. King, 49 Wisc.2d 398, 182 N.W.2d 530 (1971); People Acting Through Community Effort v. Doorley, 468 F.2d 1143 (1st Cir. 1972).

The precise questions both of the facial constitutionality of such an absolute ban on peaceful residential picketing, and the application of such an absolute ban to peaceful public issue picketing

of the residences of part time elected government officials have never been resolved by this Court. These questions, which have been answered in a manner adverse to First Amendment interests by the courts below, seem to have been expressly reserved by the Court. See Organization for a Better Austin v. Keefe, 402 U.S. 415, 417 (1971).

In a number of cases, the Court, or individual members of the Court, have intimated, although it has never been held, that government may be empowered to prohibit absolutely such residential picketing. See Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black and Douglas, J.J., concurring). Cf., e.g., Village of Belle Terre v. Borass, 416 U.S. 1 (1974); Cohen v. California, 403 U.S. 15, 21 (1971); Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949); Id., 336 U.S. at 97 (Frankfurter, Jr., concurring). Cf. also, e.g., Cameron v. Johnson, 390 U.S. 611 (1968); Adderley v. Florida, 385 U.S. 39 (1966). Other decisions, however, indicate that the government's compelling interest in protecting the privacy and serenity of the home does not sustain an absolute ban on intrusion of the "public forum"[5] into or at the home site.

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[5]See H. Kalven, The Concept of the Public Forum, 1965 SUP.CT.REV. 1.

See, e.g., Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Gregory v. Chicago, 394 U.S. 111 (1969); Martin v. Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939). Cf., e.g., Time, Inc. v. Hill, 385 U.S. 374 (1967). Cf. also, e.g., Wyman v. James, 400 U.S. 309 (1971).

The courts below decided still another important question of federal constitutional law that has not been, but should be, clearly resolved by this Court. The Court of Appeals decided that the constitutionality of the City of Artesia's absolute ban on residential picketing turns on two considerations: "The first consideration is the relationship between the picketing and the area--in this case residential structures occupied by the appellees and their families. The second is whether there exists a reasonably effective alternative means of communication to reach the intended audience." (507 F.2d at 543; Appendix, infra, p. 10a.) The Court of Appeals concluded that Rule 52, Fed.R. Civ.P., insulated the District Court's "findings" that reasonably effective alternative means of communication were available. (See 507 F.2d at

541, 543; Appendix, infra, pp. 2a-3a, 10a.)[6] Apparently the Court of Appeals also concluded that there was insufficient relationship between the picketing and the area picketed to allow the picketers to enjoy First Amendment protection, for the defendants ". . .testified that none of the business of the City of Artesia is conducted at their places of residence." (507 F.2d at 544, Appendix, infra, p. 11a.)

In one recent case, this Court has ruled that the factors considered by the Court of Appeals were relevant in one particular context in which First Amendment violations are asserted. In Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972), the actual question before the Court was whether an otherwise private shopping center was sufficiently clothed with governmental action to prohibit the shopping center from denying access to its premises by persons intent on conducting First Amendment protected activities. See American

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[6] Plaintiffs do not contest the fact that the District Court's actual findings of elemental fact are now insulated from review by this Court under Rule 52 and the so-called "two court rule." They do submit that, however, this Court is authorized to pass upon "the constitutional significance to be attached to them." Neil v. Biggers, 409 U.S. 188,193 n.3 (1972); Keyes v. Denver School Dist. No. 1, 413 U.S. 189, 198 n.9 (1973).

Radio Ass'n. v. Mobile Steamship Ass'n., ___ U.S. ___, 42 L.Ed.2d 400, 410-11 (1974). In numerous other cases, however, where, as here, no question of governmental action is before the Court, see, e.g., Hague v. Congress of Industrial Organizations, 307 U.S. 496, 515-16 (1939), this Court has expressly held that: "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163 (1939); see Martin v. Struthers, 319 U.S. 141 (1943). Moreover, counsel's research discloses no case, in which a First Amendment issue had to be decided, where this Court has ruled that First Amendment protection turns on whether there is a direct relationship between the place at which the First Amendment activity occurs and the First Amendment activity being conducted.

Plenary review of this case will provide the Court with a good opportunity to clarify these important and frequently recurring questions of constitutional law.[7]

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[7]For further evidence of the importance and recurrence of these issues see, e.g., Kamin, Residential Picketing and the First Amendment, 61 NW U.L.REV. 177 (1966); Comment, Picketers at the Doorstep, 9 HARV. CIV. RTS.-CIV. LIBS. L. REV. 96 (1974); Note, Picketing the Homes of Public Officials, 34 U.CHI.L.REV. 106 (1966).

II

THE HOLDING OF THE COURT OF APPEALS THAT THE DEFENDANTS' ABSOLUTE BAN ON ALL RESIDENTIAL PICKETING IS CONSTITUTIONAL IS INCONSISTENT WITH THE APPLICABLE DECISIONS OF THIS COURT.

As Point I, supra, demonstrates, the precise question in this case has not yet been decided by this Court. However, numerous decisions of this Court indicate the unconstitutionality of the defendants' absolute ban on all residential picketing, without regard to whether: there are one or one hundred picketers; the picketing occurs during daylight or night; the picketers are silent, speaking in conversational tones, or shouting; the picketing occurs on private or public property; there is any obstruction of pedestrian or vehicular traffic; ingress to or egress from the residential property is hindered; the situs of the picketing is the home of a public official or a private citizen; the situs of the picketing is located in a purely residential neighborhood or is also used for business and public purposes; the situs of the picketing is located in a purely residential neighborhood or a mixed "commercial" and residential neighborhood; or reasonably effective alternative means of communicating are available to the picketers. See, e.g., Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Gregory v. Chicago, 394 U.S. 111 (1969);

Martin v. Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939). Applicable decisions of this Court indicate that: (1) Picketing, although "conduct", is nevertheless also, expression, which is protected by the First Amendment. E.g., Police Department v. Mosley, 408 U.S. 92 (1972); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968). (2) Time, place and manner regulations are permissible restrictions on the protected expression component of picketing. E.g., Police Department v. Mosley, supra; Grayned v. City of Rockford, 408 U.S. 104 (1972). However, absolute prohibition of picketing at any particular classification of "place" is not constitutional in the absence of a demonstration of a substantial and compelling governmental interest, as well as the unavailability of less restrictive alternatives by way of "time" and "manner" regulations. Cf., e.g., Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967). Shelton v. Tucker, 364 U.S. 479, 488 (1960). Compare, e.g., Cameron v. Johnson, 390 U.S. 611 (1968); Adderley v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 559 (1965). (3) Although compelling, the privacy interest in residential tranquility, does not justify an absolute protection from intrusion into the home of expressive conduct in the "public forum." See,

e.g., Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Saia v. New York, 334 U.S. 558 (1948); Martin v. Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939).

Plenary review of the record in the instant case will demonstrate, under these and other applicable decisions of this Court, the unconstitutionality of Ordinance No. 347 on its face and as applied.

III

THE DECISION OF THE COURT OF APPEALS SUSTAINING THE DEFENDANTS' ABSOLUTE BAN ON RESIDENTIAL PICKETING CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

The Hawaiian statute upon which Ordinance No. 347 is based has made a strange odyssey through the cities and courts of the United States. The instant case apparently was the first test of the statute with the labor and public assembly place exemptions eliminated. As adopted by the cities of Wauwatosa and Brookfield, Wisconsin, however, the law was upheld in its entirety, including the exemptions, by the Wisconsin Supreme Court. City of Wauwatosa v. King, 49 Wisc.2d 398, 182 N.W.2d 530 (1971); City of Brookfield v. Groppi, 50 Wisc.2d 166, 184 N.W. 2d 96 (1971). As adopted by Providence, Rhode

Island, the statute, also with the exemptions intact, initially was sustained in its entirety by the United States District Court for the District of Rhode Island. People Acting Through Community Effort v. Doorley, 338 F.Supp. 574 (D.R.I. 1972). On appeal, however, it was declared unconstitutional, on the same basis that the District Court in the instant case struck down Ordinance No. 343, i.e., the labor exemption violated the Equal Protection Clause. 468 F.2d 1143 (1st Cir. 1972). See Police Department v. Mosley, 408 U.S. 92 (1972); Grayned v. City of Rockford, 408 U.S. 104 (1972).

Thus the courts below are the only courts to have passed on the precise question of the constitutionality of the statute with the exemptions eliminated. The Wisconsin Supreme Court and the United States District Court for the District of Rhode Island have sustained the statute with the exemptions intact. Although it may be inferred from these decisions and the opinions accompanying them that these courts would also sustain the statute with the exemptions eliminated, they have not addressed that precise question, which surely more clearly focuses inquiry on overbreadth.

Although no other courts have passed upon precisely the same question as the one involved

in the instant case, several other courts have demonstrated their view that absolute bans on residential picketing are unconstitutionally overbroad. This appears to be the rule in both the Fifth and Seventh Circuits. See Davis v. Francios, 395 F.2d 730 (5th Cir. 1968). Cf., Mosley v. Police Department, 432 F.2d 1256 (7th Cir. 1970), aff'd on other grounds, 408 U.S. 92 (1972). Several state courts, as well, have given ample indication that they will not sustain an absolute or otherwise overbroad prohibition of residential picketing, especially when public issue picketing is directed at the residences of government officials. Flores v. Denver, 122 Colo. 71, 220 P.2d 373 (1950); State of Connecticut v. Anonymous, 6 Conn. Cir. 372, 274 A.2d 897 (1971-72).

Not only are the opinions of the Federal Circuit and other state and federal courts in conflict on these issues, but so are the opinions of the commentators. E.g., compare, Kamin, Residential Picketing and the First Amendment, 61 NW U.L. REV. 177 (1966); Note, Picketing the Homes of Public Officials, 34 U.CHI.L.REV. 106 (1966) with Comment, Picketers at the Doorstep, 9 HARV.CIV. RTS.-CIV.LIBS.L.REV. 96 (1974). This Court should grant the Writ of Certiorari to resolve these

conflicts and clarify the law on these important issues.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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March 1975.

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1156

NORA GARCIA, et al.,

Plaintiffs-Appellants,

-v-

WILLIAM GRAY, et al.,

Defendants-Appellees.

Argued Oct. 23, 1974

Decided Dec. 17, 1974

BARRETT, Circuit Judge

This appeal is from the judgment of the United States District Court for the District of New Mexico denying plaintiffs'-appellants' prayer that Ordinance 347 of the City of Artesia, New Mexico, making it unlawful "for any person to engage in picketing before or about the residence or dwelling of any individual" be declared unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution and that the defendants-appellees be restrained from enforcing said ordinance. Jurisdiction is predicated upon 28 U.S.C. § 1343(3) and (4). The claim is alleged to arise under 42 U.S.C. § 1983 as an action to redress deprivations under color of State law.

The appellees are the mayor and the eight members of the City Council of the City of Artesia. The genesis of the dispute arose in the refusal by the appellees to recognize a particular union as bargaining agent for some 39 city employees, classified in the record as steelworkers, and the subsequent picketing.

The picketing was initiated when some 39 City of Artesia employees undertook a strike when the Mayor and councilmen refused to recognize a particular union as the bargaining agent for said employees. Thereafter, others joined the strikers, particularly in protest against alleged racial discrimination in employment practices by the City against Chicanos and want of programs or efforts to upgrade job opportunities or job promotions of Chicanos and to alleviate their low income, poverty status. The protestors--including those sympathetic with the desires of the strikers--testified that their grievances were either not heard by the appellees or, if heard, not seriously considered. The strikers-protestors did picket the City Hall, the City Warehouse and the City Disposal Plant. By reason thereof, the appellees and many of the residents of the City testified that they became fully aware of the complaints of the appellants.

The appellants testified, however, that no response or "hearing out" was ever afforded them by the appellees by reason of these activities and that they concluded that the only way to effectively present their grievances and to induce action was to proceed to the residences of the Artesia city officials where they hoped to be heard and speak with these officials personally. Appellants testified that such picketing, at reasonable hours, would be their only effective and persuasive tool under the circumstances. On the other hand, the Mayor and the Councilmen testified that each and all of the picketers-protestors were invited to attend council meetings where they were always provided a forum to express their views.

The appellants presented evidence that 95% of the City's work force at the time of the strike were Chicanos and Blacks, but after the strikers were fired the new city employee group consisted of some 60% Whites, 5% Chicanos, and only 3 Blacks. In effect, they argue that this, ipso facto, evidences racial discrimination. The appellees denied that any racial discrimination was practiced at any time. The merits of this dispute were not at issue before the trial court and are not at issue on this appeal. They

are recited simply to demonstrate that the differences involved both a labor dispute in terms of union recognition, together with a variety of discriminatory complaints.

When the strikers-protestors determined to picket the residences of appellees, Mayor Thompson testified that on one such occasion some 300 "picketers" appeared outside of his home, on the sidewalk and lawn, with signs and noisy chants of "Down with the Mayor" which endured for about one and one-half hours. He said that it was very disturbing, upsetting, and worrisome to him, his wife and his neighbors. He testified concerning one other protest in front of his residence which involved a large number of cars, some parked bumper to bumper next to the curb of his residence and others racing their motors with sliding wheels, coupled with many honking horns and noisy-car occupants. He said this demonstration was upsetting to him, his wife and his neighbors. He testified that his wife's health became very "bad" as a result of the picketing and that she was "under" medication for some time.

Similar residential "picketing" occurred at the residence of Councilman Floyd Economides which, on one such occasion, involved a picket sign which he testified read "Creep, remember you

have a wife and kids." He testified that the demonstration was very disturbing, disruptive and noisy for him, his wife, children and neighbors.

Councilman Price testified that during the picketing of his residence he, his wife and three children, ages 13, 10 and 6 were distrubed in their privacy and that the same disruption applied to his neighbors. Similar evidence was presented by other appellees. The general nature of their testimony and that of many of their neighbors was that the residential picketing created disturbance, noise and an aura of harassment and fear.

Without exception, each of the appellees and their neighbors testified that they were fully aware of the complaints of the appellants long before the residential "picketing" was undertaken. (We are well aware that this observation does not serve as justification for the prohibition of the subject residential picketing if, in fact and law, such expression is protected. Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 [1939]).

Challenged Ordinance 347 was enacted following the aforesaid dispute and other matters of discontent. Section 1 declares, inter alia,

that the "good order of the community require[s] that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy" and "that the practice of picketing before or about residences obstructs and interferes with the free use of public sidewalks and public ways of travel" and ". . .has as its object the harassing of such occupants" and ". . .constitutes a nuisance. . ." Section 2 prohibits any picketing before or about the residence or dwelling of any individual. Section 3 invokes a fine or imprisonment or both upon conviction for violation.

The trial court combined, by and with the consent of the parties, the record of the evidentiary hearing held on the motion for preliminary injunction on May 18, 1973, with the evidentiary hearing held on November 30, 1973, relating to the entire controversy as one on the merits in relation to the declaratory and injunctive relief requested.

The trial court filed a Memorandum Opinion concurrent with entry of the judgment on December 28, 1973. The Court found that the plaintiffs' grievances and desires are "well known by the people they are seeking to inform" via resort to the residential picketing violative of

Ordinance 347. The Court further found that such picketing was "distressing" to the defendants; that the right plaintiffs seek to assert, although not pure speech, is a protected First Amendment right, but that such conduct is subject to reasonable regulation; that Ordinance 347 constitutes the City's proper exercise of its police power in that the ordinance prohibits picketing in an inappropriate location and is not vague and overly broad under the guidelines of Gregory v. City of Chicago, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969); that the right of privacy in one's home sought to be protected by the ordinance is worthy of protection; and that the prohibition of picketing mandated by the ordinance does not deprive the plaintiffs of their constitutional right to picket but deprives them simply of the ability to do so in certain locations.

Appellants claim trial court error in that: (1) the ordinance violated the First Amendment because the record in this case reveals that the ordinance and the governmental interests it presumes to further are not unrelated to the suppression of free expression; (2) the ordinance's absolute ban on residential picketing violates the First and Fourteenth Amendments because it does not "further an important or

substantial governmental interest" either as (a) a proper means to eliminate harassment and abate a nuisance, (b) a justification to eliminate obstruction of an interference with the free use of public sidewalks and public ways of travel, (c) a justification on grounds that other means of expressing freedom of speech exist, or (d) a justified means of protection of feeling of well-being, tranquility and privacy; and (3) the ordinance is overbroad in violation of the Fourteenth Amendment in that alternatives less restrictive of free expression are available to regulate rather than absolutely ban residential picketing.

I.

Trial court findings--including those involving constitutional rights--may not be set aside on appeal unless they are clearly erroneous. Rule 52, Fed.R.Civ.P.; Williams v. Eaton, 468 F.2d 1079 (10th Cir. 1972); Arnold v. United States, 432 F.2d 871 (10th Cir. 1970).

The appellate court must view the evidence in the light most favorable to the prevailing party and must affirm unless the trial court findings and conclusions are clearly erroneous. Maloney-Crawford Tank Corporation v. Sauder Tank Company, 465 F.2d 1356 (10th Cir. 1972); Scaramucci v. Dresser Industries, Inc., 427 F.2d 1309

(10th Cir. 1970).

II

[1] The right of free speech is not absolute at all times and under all circumstances. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). And it is well established that protected speech may be subject to reasonable limitation when important countervailing interests are involved. United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

First Amendment challenges to statutes and regulations on the basis that they are overbroad and vague have not fared well in recent Supreme Court decisions. In Parker, Warden v. Levy,__ U.S.__, 94 S.Ct. 2547, 41 L.Ed.2d 439 (June 19, 1974), the Court rejected the "void for vagueness" challenge under the due process clause of the Fifth Amendment and the "overbroad" challenge under the First Amendment, by upholding a general court-martial conviction under Art. 133 which prescribes punishment of an officer for "conduct unbecoming an officer and a gentleman" and Art. 134 which punishes "all disorders and neglects to the prejudice of good order and discipline in the armed forces." See also Secretary of Navy v. Avrech, __U.S.__, 94 S.Ct. 3039, 41 L.Ed.2d

1033 (1974), involving conviction on charges of publishing a statement "with design to promote disloyalty and disaffection among the troops", and Arnett, Director, Office of Economic Opportunity, et al. v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (April 16, 1974), upholding removal or suspension of pay of a civil servant under the federal civil service code "for 'such as will promote the efficiency of the service'."

III.

[2] First Amendment guarantees of free expression cover a multitude of factual relationships. See Healy v. James, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972). These rights must be judged on a balancing basis. Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968). There are two primary considerations involved in the "balancing" test determinative as to whether protestors have the right to conduct picketing on or in direct relation to private property. The first consideration is the relationship between the picketing and the area--in this case residential structures occupied by the appellees and their families. The second is whether there exists a reasonably effective alternative means of communication to reach the intended audience. See Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219, 33

L.Ed.2d 131 (1972). The rationale in Lloyd is that the initial inquiry should be whether the conduct assertedly protected by the First Amendment is "directly related in its purpose" to the use to which the subject property is being put. We consider it most relevant to observe here that the appellees testified that none of the business of the City of Artesia is conducted at their places of residence.

IV.

[3,4] Picketing used to communicate ideas is within the protective ambit of the First Amendment. It is nevertheless subject to reasonable regulation and control under the police power processes relating to time, manner and place for the purpose of maintaining public order. Jones v. Opelika, 316 U.S. 584, 62 S.Ct. 1231, 86 L.Ed. 1691 (1942), vacted on reh. on other grounds, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943); Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed.2d 1117 (1931). The preferred position of free speech and expression does not require legislators to be insensitive to claims by citizens of their entitlement to comfort and convenience. Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949).

[5] The possession and enjoyment of all constitutional guarantees are subject to the police power involving reasonable conditions deemed by the governing authorities essential to insure the safety, health, peace, good order and tranquility of the community. Chicago & Alton Railroad Company v. Tranbarger, 238 U.S. 67, 35 S.Ct. 678, 59 L.Ed. 204 (1915). The scope of the police power is to be measured by the legislative will of the people upon questions of public concern. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937). Thus, in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969), the Supreme Court said that First Amendment guarantees must be "applied in light of the special characteristics of the. . .environment." In this regard we take special note of the language employed by Mr. Justice Douglas, writing for the majority in Village of Belle Terre et al. v. Borass et al., 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797, 804 (1974):

The police power. . .is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people. (Italics supplied).

We are not here involved in any question relating to ordinances which sweepingly prohibit any person in or upon any public place to picket. Such ordinances have been condemned on their face as unconstitutional invasions of free speech. Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Carlson v. California, 310 U.S. 106, 60 S.Ct. 736, 84 L.Ed. 1104 (1940). Rather, we are here dealing with an ordinance prohibiting picketing before or about residences. In the recent case of Rowan v. United States Post Office Department, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed. 2d 736 (1970), Mr. Chief Justice Burger stated that the concept that "a man's home is his castle" into which not even the king may enter, has lost none of its vitality.

[6] The regulation and abatement of nuisances is one of the basic functions of the police power. Municipalities are generally considered as having been given the right to suppress them. 56 Am.Jur.2d, Municipal Corporations, §§ 443-446, pp. 492-498, and cases cited therein. This includes the regulation or prohibition of certain noises which may affect health, well-being and tranquility. 56 Am.Jur.2d, Municipal Corporations, § 470, pp. 519-520, and cases cited therein.

[7] A municipality may enact ordinances declaring certain acts to constitute nuisances even though the acts violate only private rights and produce damages to but one or a few persons. 58 Am.Jur.2d, Nuisances, § 9, p. 564, et seq., and cases cited therein. Of course, any such restrictions or limitations must be carefully scrutinized and cannot be lightly treated. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

The balancing of competing rights generally has resulted in a determination that the privacy of the individual householder, even that of a public official, is entitled to protection. Gregory v. City of Chicago, supra; Allen-Bradley Local, etc. v. Wisconsin Employment Relations Boards, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154 (1942); Hall v. Hawaiian Pineapple Co., 72 F.Supp. 533 (D.C. Hawaii, 1947); City of Wauwatosa v. King, 49 Wis.2d 398, 182 N.W.2d 530 (1971); State v. Anonymous, 6 Conn.Cir. 372, 274 A.2d 897 (1971); Keefe v. Organization for a Better Austin, 115 Ill. App.2d 236, 253 N.E.2d 76 (1969), rev'd. on other grounds, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d (1971); Pipe Machinery Co. v. De More, 76 N.E.2d 725 (Ohio App.1947); Evening Times Printing & Publishing Co. v. American Newspaper Guild, 124

N.J.Eq. 71, 199 A. 598 (1938); State v. Perry, 196 Minn. 481, 265 N.W. 302 (1936). See also 93 A.L.R.2d 1284, Anno. Nonlabor Picketing or Boycott.

[8] In the case at bar, just as in City of Wauwatosa v. King, supra, the subject ordinance forbidding residential picketing does, from the facts contained in the whole of this record, constitute a valid exercise of governmental power intended to insure that members of the Artesia community enjoy in their homes a feeling of well-being, tranquility and privacy.

We affirm.

SETH, Circuit Judge (concurring):

This action began as a challenge to Ordinance 343 of the City of Artesia which was a ban on residential picketing except in a labor dispute. The trial court enjoined the enforcement of Ordinance 343 by reason of the exception referred to, and in reliance on Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212. However, before the injunction went into effect, the City enacted Ordinance 347, which contained no exceptions. The plaintiffs amended their complaint to attack the new ordinance. The "picketing" which took place occurred under the prior ordinance (343), and there has

been no picketing under No. 347.

Under these circumstances, the appeal is not concerned with any construction or application of particular wording of the ordinance or of definitions. The plaintiffs thus assert that on its face, in its absolute prohibition of residential picketing and in whatever degree or orderliness, it encroaches on First Amendment rights to an unreasonable extent.

Ordinance 347 is as broad a prohibition of residential picketing as could be devised, but the breadth is not to be measured against picketing or residential picketing, but against protected First Amendment rights. In this perspective it does prohibit certain speech-related conduct at a particular place. The nature and extent of the prohibited acts are set against the interests, rights, or privileges sought to be protected by the ordinance. Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487. It would serve no purpose to again describe the importance of the speech aspects of the balancing. In the situation before us, the pleadings frame the issues between the plaintiffs on one side and certain part-time elected public officials on the other. The basic problem relates to the hiring of city employees and it is a public-political problem.

In this context it is apparent that several avenues are open for the exercise of the speech-public information rights both geographically and by reason of defendants' representative capacities as public servants. The homeside, fireside, privacy aspects have been described in Gregory v. Chicago, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134, and Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510.

It is apparent that whatever restrictions on First Amendment rights which may come about under this ordinance--the requirement that whatever unique communication advantages that may be derived from residential picketing must be foregone--do not outweigh the need for protection of privacy in the home and home neighborhood. This protection is available for public officials as a place where there is only an identity as a private individual, and where their families and neighbors may do the same. See Lloyd Corp v. Tanner, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131, and Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487.

I agree with the analysis of the balancing made by Judge Barrett and by the trial judge in this respect. I would thus affirm the judgment of the trial court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NORA GARCIA, et al., Plaintiffs,	)	
-v-	)	NO. 10081 CIVIL
WILLIAM GRAY, et al., Defendants.	)	

JUDGMENT

This action having come on for final hearing, and the Court having filed herein its Memorandum Opinion finding that Ordinance 343 of the City of Artesia is unconstitutional and that Ordinance 347 of the City of Artesia is not constitutionally infirm; Now, Therefore,

IT IS BY THE COURT ORDERED AND ADJU ED that Ordinance 343 of the City of Artesia is unconstitutional and the defendants William Gray, Howard Price, Floyd Economides, Charles Hemmet, Cecil Hill, Robert Brisinio, Fred Mermis and Wayne Kemp, individually and as members of the City Council of the City of Artesia, and Ernest Thompson, individually and as Mayor of the City of Artesia are hereby permanently enjoined from enforcing Ordinance 343 of the City of Artesia, which makes it unlawful within the corporate limits of Artesia,

New Mexico, for any person to engage in residential picketing except during a labor dispute at the place of employment involved in such labor dispute, against the plaintiffs Nora Garcia, Robert Alaniz, Randy Jackson, Ramon Barrera and Joe Aguilar.

IT IS THE FURTHER ORDER and JUDGMENT of the Court that the plaintiffs' demand that Ordinance 347 of the City of Artesia be declared unconstitutional and its enforcement by the defendants be enjoined be, and it hereby is, denied on the merits.

/s/

Filed at Albuquerque
Dec. 23, 1973
L.G. Kanaly, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NORA GARCIA, et al., Plaintiffs, -v- WILLIAM GRAY, et al., Defendants.	)	NO. 10081 CIVIL

MEMORANDUM OPINION

On June 22, 1973, a Memorandum Opinion and an Order were entered in this action, restraining the enforcement of Ordinance Number 343 of the City of Artesia against the plaintiffs until the matter could come on for final hearing. The factual background of the controversy in the present action and the issue of the constitutionality of that ordinance are discussed in the Court's previous opinion and need not be repeated here. Suffice it to say that, the matter having come on for final hearing, it is concluded that Ordinance 343 is unconstitutional, and its enforcement will be permanently enjoined by an appropriate order.

This conclusion does not resolve the entire controversy, however, for the city council members have enacted a new ordinance dealing with

the same subject matter, and the plaintiffs by amended complaint also challenge its constitutionality.

Ordinance 347, the city's new picketing ordinance, differs from Ordinance 343 in that it makes it unlawful to engage in any picketing before or about any person's residence. There is no exception for any given kind of picketing. The new ordinance was passed after the hearing on the preliminary injunction in this matter and before the court entered its opinion and order restraining the enforcement of Ordinance 343. In enacting a new ordinance, the city council members relied on the advice of their attorney that Ordinance 343 might be found to be unconstitutional.

The plaintiffs claim that the new ordinance is vague, overly broad and amounts to a prior restraint. They contend that the city can and should use less drastic means than the ordinance in question to regulate conduct like that previously undertaken by them. They allege that they have been and will be unable to get their message across without the aid of the tool of residential picketing.

In defense to this charge, the city officials claim they and all other citizens have the right of privacy, which is nullified if plaintiffs can

picket their homes, and that plaintiffs have made clear their position without resort to residential picketing. The defendants assert that the use of residential picketing in this case is in reality a show of force designed to effect through harassment the changes plaintiffs desire but have been unable to achieve by other means.

The plaintiffs assert that they are unable to convey their message without resort to residential picketing, but the evidence belies this claim. Indeed, the evidence shows that the plaintiffs grievances and desires are well known by the people they are seeking to inform. The evidence also shows that the residential picketing engaged in by plaintiffs before enactment of the first ordinance was distressing to the defendants. Further, the evidence establishes that there are available to plaintiffs other methods to convey their position and that the plaintiffs have effectively availed themselves of such other means of communication.

While the right plaintiffs seek to assert is not pure speech, it is a protected right. Certainly, picketing involving public issues and directed toward public officials is protected by the First Amendment. However, it does not follow

that such conduct is not subject to any regulation. On the contrary, under the city's police power, it can be regulated, and an ordinance drawn to reasonably regulate time, place, and manner is not constitutionally infirm.

It is concluded that the new ordinance, prohibiting picketing in an inappropriate location, is a proper exercise of the city's regulatory power. See Gregory v. Chicago, 394 U.S. 11, 124-26 (1969) (Black, J., concurring opinion.) Further, the language of the ordinance is sufficiently distinct that its boundaries can be understood. The right of privacy in one's home sought to be protected by it is a right worthy of protection, and such picketing can be prohibited without the abridgment of constitutional rights of others. The prohibition does not deprive the plaintiffs of their right to picket. It only deprives them of the ability to do it in certain locations.

Accordingly, the demand for injunctive relief against the enforcement of Ordinance 347 of the City of Artesia will be denied.

/s/
UNITED STATES DISTRICT JUDGE

Filed at Albuquerque
Dec. 28, 1973
L.G. Kanaly, Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

NORA GARCIA, ROBERT ALANIZ, RANDY JACKSON, RAMON BARRERA and JOE AGUILAR,

Plaintiffs,

-v-

CITY OF ARTESIA, an incorporated municipality, WILLIAM GRAY, HOWARD PRICE, FLOYD ECONOMIDES, CHARLES HAMMETT, CECIL HILL, ROBERT BRISINIO, FRED MERMIS, WAYNE KEMP, individually and as members of the City Council of the City of Artesia, and ERNEST THOMPSON, individually and as Mayor of the City of Artesia,

Defendants.

Municipal League of New Mexico,

Amicus Curiae.

NO. 10081 CIVIL

MEMORANDUM OPINION

The plaintiffs have filed herein an action pursuant to 42 U.S.C.A. § 1983 and 28 U.S.C.A. §§ 2201 - 02. A preliminary and permanent injunction are sought, together with a declaratory judgment that City Ordinance Number 343 of the City of Artesia is unconstitutional. The defendant city officials are charged with having promulgated the

above ordinance, which makes it unlawful to engage in picketing before or about the residence of an individual within the city limits,[1] and they

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[1] BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ARTESIA, NEW MEXICO, as follows:

Section I: Declaration. It is hereby declared that the protection and preservation of the home is the keystone of democratic government; that the public health and welfare and the good order of the community require that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy, and when absent from their homes and dwellings, carry with them the sense of security inherent in the assurance that they may return to the enjoyment of their homes and dwellings; that the practice of picketing before or about residences obstructs and interferes with the free use of public sidewalks and public ways of travel; that such practice has as its object the harassing of such occupants; that such practice constitutes a nuisance and a practice which should be prohibited; and without resort to such practice full opportunity exists, and under the terms and provisions of this ordinance, will continue to exist for the exercise of freedom of speech and other constitutional rights; and that the provisions hereinafter enacted are necessary for the public interest to avoid the detrimental results herein set forth and are, therefore, enacted by the City Council of the City of Artesia, New Mexico.

Section II: It shall be unlawful within the corporate limits of the City of Artesia, New Mexico, for any person to engage in picketing before or about the residence or dwelling of any individual. Nothing herein shall be deemed to

are sought to be enjoined from any enforcement of Ordinance 343. The ordinance is attacked on the basis that it violates the First and Fourteenth Amendments.

The plaintiffs are persons who have picketed at public buildings and have attended Artesia City Council meetings to express their greivances with regard to alleged racial tensions, discrimination in schools, the unresponsiveness of local government, support for certain city employees on strike, and a unionization attempt of city employees. While the unionization attempt and the strike

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prohibit (1) picketing in any lawful manner during a labor dispute of the place of employment involved in such labor dispute, or (2) the holding of a meeting or assembly on any premises commonly used for the discussion of subjects of general public interest.

Section III: Any person violating the provisions of this ordinance shall be punished by fine of not more than Three Hundred Dollars ($300.00) or imprisonment not exceeding ninety (90) days, or by both such fine and imprisonment.

PASSED, ADOPTED AND APPROVED this 10 day of October, 1972.

CITY OF ARTESIA, NEW MEXICO

By /s/ Ernest Thompson
Mayor

ATTEST:

/s/ H. R. Taylor
City Clerk

play an important part in their motivation, it can fairly be said that the overriding concern of the plaintiffs is, in labor and other areas, their feeling that there is discrimination against the poor and the ethnic minority in Artesia.

Prior to the passage of Ordinance 343, there was picketing of the homes of some of the city officials. None of the plaintiffs has engaged in residential picketing since its passage. Rather than disobey it and risk prosecution, they seek to overcome it by the present action.

The action has come on for hearing. The defendants' motion to dismiss has been argued, together with the issue of the propriety of issuing a preliminary injunction, should the plaintiffs make the showing necessary to support the right to such relief. At the hearing, it was defendants' contention that Younger v. Harris, 401 U.S. 37 (1971), and its companion cases,[2] particularly Boyle v. Landry, 401 U.S. 77 (1971), preclude injunctive relief because they claim the plaintiffs cannot show that they would suffer irreparable injury if the city of Artesia is left free to prosecute under the

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[2] Samuels v. Mackell, 401 U.S. 66 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971).

residential picketing ordinance in the normal manner.

The plaintiffs' position is that Younger v. Harris, supra, and its companion cases do not apply where, as here, there is no pending state prosectution. It is argued that the exercise of this Court's jurisdiction is appropriate if the conditions for declaratory or injunctive relief are met. Further, since this is an action under Section 1983 of the Civil Rights Act, it is argued that the reasoning of Mitchum v. Foster, 407 U.S. 225 (1972), which excepted Section 1983 actions from the anti-injunction statute, 28 U.S.C.A. § 2283, makes injunctive relief appropriate in the present case, where plaintiffs are being deprived of fundamental constitutional rights.

The present action is an appropriate one for injunctive relief and the plaintiffs have made a showing sufficient to enable them to the preliminary injunction they seek. There is no pending state proceeding with which the Court would interfere by acting in this matter, and the principles of comity and federalism reflected in the decisions in Younger v. Harris, supra, and its companion cases do not apply. In particular, the present case is distinugishable from Boyle v.

Landry, supra, which was filed by persons who had made a search of ordinances with a view to picking out ones they thought might be used against them by the by the [sic] authorities. The ordinance here challenged was adopted in response to plaintiffs' activities, and the plaintiffs' allegations herein cannot be, as they were in Boyle, characterized as "flimsy." Further, while the circumstances presented in Mitchum v. Foster, supra, differ from those in the present case, it is persuasive authority for the propositions that the present Section 1983 action should not be dismissed, as desired by defendants, on the basis of lack of jurisdiction and that injunctive relief is most appropriate in this case. See also, Lake Carriers' Ass'n. v. MacMullan, 406 U.S. 498 (1971). This Court is the appropriate forum in which to seek to overturn an ordinance attacked as facially defective. Zwickler v. Koota, 389 U.S. 241 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965).

The plaintiffs have established an irreparable injury and the likelihood of success on the merits by their challenge to the ordinance, the unconstitutionality of which is apparent on its face. Ordinance 343 prohibits residential picketing on all but one preferred subject. This is inconsistent

with the Equal Protection Clause. Police Department v. Mosley, 408 U.S. 92 (1972); Grayned v. City of Rockford, 408 U.S. 104 (1972); People v. Doorley, 468 F.2d 1143 (1st Cir. 1972).

The City of Artesia, named herein as a defendant, is not a person within Section 1983, City of Kenosha v. Binno, 41 U.S.L.W. 4819 (U.S. June 12, 1973). It should be dismissed as a defendant in this action, and no injunction will issue against it.

Accordingly, a preliminary injunction will be entered herein, together with this Memorandum Opinion.

/s/
UNITED STATES DISTRICT JUDGE

Filed at Albuquerque
June 22, 1973
E.E. Greeson, Clerk